Dec 10, 2000

No. 00-949

Supreme Court, U.S.
FILED
DEC 13 2000

In the Supreme Court of the United States

George W. Bush, et al.,

Petitioners,

v.

Albert Gore Jr., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE BUTTERWORTH IN SUPPORT OF RESPONDENT GORE ET AL.

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INTEREST OF THE AMICUS

The Florida Attorney General is the state's chief legal officer. Art. IV, sec. 4(c), Florida Constitution. The Attorney General has broad common law powers to act on the state's behalf. *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

As the state's chief legal officer, the Attorney General has a fundamental interest in the constitutional operation of Florida government and in maintaining the proper relations between its branches, as established in the state constitution. This proceeding challenges, inter alia, the authority of the State's highest court to resolve disputes involving the selection of presidential electors. In so doing, the proceeding raises important issues of federalism and the authority of Florida to resolves state-law disputes in the manner the State deems appropriate. The Attorney General should be heard on these important issues.

SUMMARY OF THE ARGUMENT

When the Florida Legislature enacted a method for selecting presidential electors by general law applicable to all state elections, it understood that elections contests would be subject to judicial review. Had the Legislature wished to exempt presidential elections contests from judicial review it could have done so. But it did not.

Florida law provides constitutionally adequate procedures for determining voter intent.

ARGUMENT

The constitutional sovereignty of the states to judge their own laws, and the interplay of state statutes and state constitutions, have been jeopardized by positions asserted by the petitioners solely to gain an advantage of the moment. But such transitory individual interests must give way to fundamental constitutional principles of federalism and the rights of states to govern themselves.

U.S. Const., Art. II, sec. 1, cl. 2 confers a right upon each "State" to appoint presidential electors in such manner as the Legislature thereof may direct." The petitioners assert that, because of U.S. Const., Art. II, sec. 1, cl 2, the state judiciary has no jurisdiction to resolve conflicts in state elections laws pertaining to the appointment of presidential electors. Petitioners' propose a dangerous precedent which is contrary to the Founders' intent, this Court's prior holdings and the constitutionally protected concept of state sovereignty.

I. THE FLORIDA LEGISLATURE INTENDED THAT THE STATE SUPREME COURT WOULD HAVE JURISDICTION TO REVIEW STATE STATUTES REGARDING THE MANNER OF APPOINTMENT OF PRESIDENTIAL ELECTORS. FLORIDA STATUTES AUTHORIZE THE FLORIDA SUPREME COURT TO INTERPRET AND APPLY FLORIDA ELECTIONS LAWS.

The majority opinion of the Florida Supreme Court took great care to respond to this Court's earlier admonishment to reveal the precise grounds for its holding. The challenged opinion contains a detailed analysis of the Florida statutory and Florida case law upon which it is based — all legal precedents in existence *prior* to November 7, 2000. Dec. 8 Florida

Opinion, p. 6. The opinion demonstrates the existence of long-standing statutes and case law establishing the Florida Supreme Court's jurisdiction to review the matters at issue in this case and supporting the substance of that holding.

As noted by the Florida Supreme Court, "the [Florida] Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. . . ." Dec. 8 Florida Opinion, p. 18, f.n. 11. The Legislature has, thus, chosen to prescribe the manner for appointment of its presidential electors *by general statute,* authorizing a popular election. Section 103.011, Fla. Stat.

Contrary to Petitioners' assertions here, the Legislature has itself incorporated the State Constitution into the statutory methods of dispute resolution. The Legislature has declared that "[t]he State Constitution contemplates the separation of powers among the legislative, executive, and judicial branches of the government" and *has delegated* to the judicial branch the responsibility for "adjudicating any conflicts arising from the interpretation or application of the laws." Section 20.02(1), Fla. Stat. This provision of statutory law thus enacts the constitutional authority of the courts as described in the Florida Constitution, including Article V, Section 3(b) which establishes the jurisdiction of the State Supreme Court.

The legislature has made no exception or express exclusion of the elections laws pertaining to appointment of presidential electors from that statutory grant of authority. The laws of Florida confirm that, if the Legislature had wanted to create such an exception, it knew how to do so. For example, Florida

law imposes such a limitation on judicial review in the context of legislative elections.[1]

Florida law does vest initial jurisdiction in the Florida circuit courts to hear election contests pursuant to Florida Statutes 102.168. But the legislative design is that a circuit court's decision is subject to review by a higher court, and no exception is made for presidential electors. This statutory design does not violate Art. II, sec. 1.

As this Court noted in *Bush v. Palm Beach County Canvassing Board*, case no. 00-836 (December 4, 2000), "[a]s a general rule, this Court defers to a state court's interpretation of a state statute." *Bush*, p. 4. It is particularly imperative that this principle be scrupulously adhered to where, as here, the state court decision concerns a matter entrusted to the states by express federal constitutional grant. This Court should not intrude on the resolution of these state law matters by the state's highest court and should not disturb the judgment of the Florida Supreme Court regarding the adjudication of a conflict arising from the interpretation and application of Florida's elections laws – a matter statutorily conferred *by* the Florida legislature *on* the Florida courts.

We suggest further that petitioner's reliance on *McPherson v. Blacker*, 146 U.S. 1 (1892), and this Court's opinion in *Bush v. Palm Beach County Canvassing Bd.*, Petitioners' Exh. D, to exclude the judiciary from the state-authorized methods of

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[1] See e.g. Art. III, sec. 2, Fla. Const., which provides in relevant part that:

Section 2. Members; officers.– Each house shall be the sole judge of the qualifications, elections, and returns of its members . . .

resolving presidential election disputes is misplaced. Perhaps no precedent of this Court more plainly establishes the jurisdiction of the judiciary, both at the state and federal levels, to interpret laws concerning a state legislature's directions regarding the manner of appointing electors than does *McPherson v. Blacker*. The petitioner argues that this Court "reemphasized" in *Bush, supra*, that "the federal constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' of the State. *Bush*, [Petitioners'] Exh. D. at 5 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892))." Petitioners' Stay Petition, p. 24. However, neither *Bush* nor *McPherson* reaches such a conclusion.

As this Court noted in *Bush*, the question the petitioners raise here was not addressed in *McPherson v. Blacker*, *supra*. Slip Op. p. 4. Indeed, in direct contravention to the petitioners' premise here, the complete quotation from *McPherson v. Blacker*, 146 U.S. at 25 reads as follows:

> The legislative power is the supreme authority, *except as limited by the constitution of the state,* and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the fundamental law* power is elsewhere reposed. The constitution of the United States frequently refers to the state as a political community, and also in terms to the people of the several states and the citizens of each state. What is forbidden or required to be done by a state is forbidden or required of the legislative power *under state constitutions as they exist.* The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem

> that the legislative power of appointment could not have been successfully questioned *in the absence of any provision in the state constitution* in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

(Emphasis supplied).

The context of *McPherson* makes clear that it is an appropriate and expected role of the state judiciary to interpret and review even those laws enacted by state legislatures that concern the manner in which electors are appointed. The issue in *McPherson* was whether Art. II, sec. 1, cl. 2 authorized states to choose electors in district elections rather than statewide. The case came to the court *after* review and determination *by the Michigan Supreme Court* on the validity of the statute. The Michigan Supreme Court had determined it was within the power of a state legislature to direct district elections of presidential electors, but invalidated several provisions of the statute prescribing the times for doing certain things as violative of federal deadlines. This Court *affirmed* the holding of the Michigan Supreme Court — including that aspect of the holding invalidating the timing provisions.

Further, in *McPherson*, this Court looked *to the constitution of the state of Michigan* in analyzing one of the provisions of the statute rejected by *both* the supreme court of Michigan *and* this Court. *McPherson v. Blacker*, 146 U.S. at 41. Had this Court believed that neither the state constitution applied nor the state judiciary had jurisdiction to interpret and review the validity of a statute enacted in pursuit of a state legislature's authority under Art. II, sec. 1, cl. 2, this Court would have so

stated in ruling on the challenge to the Michigan Supreme Court's holding. However, rather than holding that the state supreme court lacked jurisdiction over such matters, as now asserted by the petitioners, this Court *affirmed* the state supreme court's order — including the part invalidating portions of the state elections statute. *McPherson v. Blacker*, 146 U.S. at 41, 42.[2] See *Smiley v. Holm*, 285 U.S. 355 (1932), holding that the grant of authority to a state legislature in U.S. Const., Art. I, sec. 4 was conditioned by the authority given to the state legislature under its state constitution.[3] *See also, Davis v.*

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[2] "We entirely agree with the supreme court of Michigan . . . and are of the opinion that the date may be rejected, and the act held to remain otherwise complete and valid."

[3] The Court specifically held that:

> Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article 1, sec. 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. . . That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, s. 7. The latter consequence was not expressed, but there is no question that it was necessarily implied, as the

Hildebrant, 241 U.S. 565, 567 36 S. Ct. 708, 709 (1916) ("It was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained.").

Unquestionably, state legislatures have great latitude under Art. II, sec. 1, cl. 2, in directing the manner of appointment of electors in the state.[4] Article II should not be interpreted as precluding a State from resolving disputes concerning the selection of electors pusuant to the State's constitutionally authorized structure. In the case at bar, there is no conflict between the election laws and the Constitution. The clear design of the Legislature is that the election laws and Constitution would work in tandem and provide meaning to each other.[5]

Congress was to act by law . . .
Smiley v. Holm, 285 U.S.. at 368-369.

[4] "This provision, one of the few in the constitution that grants an express plenary power to the States, conveys 'the broadest power of determination' and '[i]t recognizes that [in the election of a President] the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object.' McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 7, 36 L.Ed. 869 (1892) (emphasis added [in original])." *Anderson v. Celebrezze*, 460 U.S. at 806-807, 103 S.Ct. at 1579 (dissenting opinion).

[5] Under *federal* law, a state's power to establish the manner of selecting electors is not absolute. For example, once a state confers a right to vote for presidential electors, that right cannot be abridged in a manner that violates federal

Therefore, the Supreme Court of Florida had jurisdiction to enter its order and this Court should not disturb that court's interpretation of Florida law. This Court should affirm the jurisdiction of the Florida state courts and reject the petitioners' assault on the vitality of Florida's laws and constitutions under the guise of Art. II, sec. 1.[6]

We further note that the weakness of Petitioner's argument regarding the meaning of Article II is revealed by applying their

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constitutional or statutory provisions. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 11 (1982).

Two United States Supreme Court cases, *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Anderson v. Celebrezzee*, 460 U.S. 780 (1983), speak to the limits imposed by federal constitutional provisions on the exercise of state legislatures' authority to direct the manner of choosing electors. Both cases make clear that the power of states to select electors to choose the President and Vice President cannot be exercised in such a way as to violate express *federal* constitutional commands. Both cases hold that, while Art. II, sec. 1 grants extensive powers to states to pass laws regulating the selection of electors, the provision does not give states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes*, 393 U.S. at 28-29; *Anderson v. Celebrezzee*, 460 U.S. at 794-795, 806.

[6] The Attorney General addressed the impact of 3 U.S.C. 5 in his brief in *Bush v. Palm Beach County Canvassing Board, Case No. 00-836* (Dec. 4, 2000). We stand with that analysis and contend that Section 5 has little meaning here, other than to provide a safe harbor for electors if certain circumstances arise.

analysis to overseas ballots which the State receives up to ten days following an election so long as the vote is cast before the close of the polls on election day. This extended time for receipt of ballots has not been enacted by the Legislature. Florida law requires that absentee ballots be received by the close of the polls on election day. The extended period results from orders entered in *United States v. State of Florida*, Civ. No. TCA 80-1055 (N.D. Fla.). The litigation was brought pursuant to the Overseas Citizens Voting Rights Act of 1975, 42 U.S.C. 1973dd *et seq.*, and the Federal Voting Assistance Act of 1955, 42 U.S.C. 1973cc(b). Those laws provided that states must allow military personnel and civilians overseas to vote by absentee ballot in federal elections pursuant to regular state absentee provisions. The federal statutes did not provide for the extended period to return ballots. But like the issues presented to the Florida courts resulting in the controversy today, the inter-workings of the Florida election code did not allow sufficient time to get the ballots back by election day. Thus, to resolve the conflict among the laws, it was agreed by the executive branch of our government that the deadline for return of ballots would be extended.

There is no question that military and overseas ballots should be granted this extension even though the Legislature has not enacted a law so providing -- but Petitioner's analysis leads to a contrary conclusion. Petitioners have contended that the extension is authorized by federal law notwithstanding Article II. But the federal law does not provide the extension, and it is questionable whether Congress would have authority to grant such an extension in the face of the Article II delegation to the states.

II. FLORIDA LAW PROVIDES ADEQUATE PROCEDURES FOR DETERMINING VOTER INTENT.

The petitioners attack the standards used during the review of ballots in the post-election contest, contending that they lack guidelines. The Florida Supreme Court followed state law governing election contest provisions by remanding the case back to the Circuit Judge to set guidelines during the ongoing "investigation and examination" phase of the election contest. In fact, circuit judge Lewis requested each county canvassing board to submit their standards for counting the ballots and determining "voter intent" as provided by Florida statutes. Unfortunately this process was interrupted by this Court's stay of the election contest.

Finally, the petitioners' argument raises the issue of what is a legal ballot, which is a matter of state and not federal law. The "legality" of a vote is not judged by whether it can be read by a machine or not, but by whether the intent of the voter can be ascertained by an examination of the ballot. The Florida Supreme Court properly held that, under Florida law in existence on November 7, 2000, "a legal vote is one in which there is a 'clear indication of the intent of the voter.'" Dec. 8 Opinion, p, 25. *See*, Section 101.5614(5), Fla. Stat. (2000) ("No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."); Section 101.5614(6). Fla. Stat. (any vote in which the board cannot discern the intent of the voter must be discarded); Section 102.166(7)(b), Fla. Stat. ("If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."). This Court should lift the stay and permit the lawful votes contained in the 45,000 "no registered vote" ballots, statewide, to be counted.

CONCLUSION

For these reasons, the Court must affirm the decision below, and allow the manual count of presidential ballots to continue.

RESPECTFULLY SUBMITTED,

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Dated: December 10, 2000